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Djadjev, Ilian

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The SCOPIC clause as a major development in salvage law

The SCOPIC clause in the context of the Lloyd's Open Form and the International Convention on Salvage (1989)

Ilian Djadjev¹, University of Groningen

Abstract. *The SCOPIC clause (Special Compensation P&I Club Clause) provides an alternative remuneration to salvors, which is computed differently to the awards provided in Article 13 and Article 14 of the International Convention on Salvage (1989). In essence, SCOPIC provides agreed tariff rates under the form of a remuneration as an indemnity for the salvage services performed and the salvor's investments in the operation. The award afforded by SCOPIC, although being a modification of the Article 14 Special Compensation, is based on different principles than those underlying the respective provision of the Convention. The major aim of the current paper is to give a comprehensive explanation of the clause and its features. It will also clarify the development and the operation of the SCOPIC clause and will underline the advantages which it provides to the area of marine salvage. To understand the essence of the SCOPIC clause, one has to be familiar also with the awards available under Articles 13 and 14, and, therefore, a comparison between the three will be made. Thus, it will be illustrated that, depending on the award chosen, there could be a different outcome for all the parties involved in the salvage operation.*

1. Introduction

The *Special Compensation P&I Club Clause* (SCOPIC) was devised to be incorporated into a Lloyd's Open Form salvage contract in order to rectify the imperfections of the International Salvage Convention (1989). To understand how SCOPIC works, a review of the main points of salvage law will be carried out. First, the regulatory framework will be introduced and, in particular, those articles of the International Convention on Salvage which provide for an award to salvors for the operations they render to vessels in distress. Secondly, the LOF salvage contract will be explained, which is the natural place where the SCOPIC clause is to be found. Thirdly, the clause itself will be thoroughly analyzed, and a table will be used to indicate the main aspects of the various awards available, including the SCOPIC remuneration.

2. The International Convention on Salvage (1989)

The International Convention on Salvage (1989) is the legal backbone in the architecture of modern salvage law. Introduced by the International Maritime Organization (IMO), the Convention codifies the ancient salvage principle of “*no cure-no pay*”, meaning that no payment shall be

¹ The author is a PhD fellow at the University of Groningen, the Netherlands. This paper was written with the kind support of Prof. M.H. ten Wolde, Mr. R. Beets, and Mr. J. de Haan. Ilian N. Djadjev may be reached at i.djadjev@rug.nl and ilian_nd@yahoo.com. July 2015, Groningen.

effected if the salvage operations have had no useful result. Subject to that principle, Article 13 of the Convention entitles a salvor with an award that is assessed according to ten criteria such as: the salved value of the vessel and other property, the salvors' skill and efforts, the measure of success obtained, the nature and degree of danger, the time used and the expenses and losses incurred, *etc.* An Article 13 Salvage Award is paid by both the ship and the cargo interests *pro rata* to the salved value, and is insured by their property underwriters – the H&M and cargo underwriters, respectively. An important principle is that the amount of the award cannot exceed the salved value of the vessel and other property.

Article 14 of the Convention, on the other hand, introduced a new concept – the “*safety net*” principle, which had been absent in the previous 1910 Brussels Salvage Convention.² The reason for this novelty was that, in the second half of the 20th century, the transportation of oil increased and so did the pollution to the environment, which proved the ineffectiveness of the “*no cure-no pay*” principle. Nations became aware of the enormous damage caused by environmental pollution, and also of the fact that salvors were not motivated to go to the assistance of tankers and engage in expensive salvage operations, while running the risk of not earning any award under the “*no cure-no pay*” principle. The “*safety net*” rule, however, encourages salvors to assist any vessel that is a threat to the marine environment and ensures that they will not lose money. The reason for this significant change of law is, thus, the policy to include protection of the marine environment among the aims of salvage law.

Accordingly, Article 14, which embodies this new principle, provides a special compensation for salvors who failed to earn an Article 13 award that is at least equivalent to the special compensation, but who undertook salvage of a vessel which threatened damage to the environment. Unlike the traditional Article 13 award, the special compensation is payable only by the owner of the distressed vessel, and its amount is equivalent to the salvor's expenses, which consist of (1) the salvor's out-of-pocket expenses and (2) a fair rate for the equipment and personnel engaged in the salvage operations. Additionally, if the salvor actually prevented or minimized damage to the environment, he is entitled to an increase of the special compensation with up to a maximum of 30% of his expenses.³ Conversely, if the salvor has been negligent and has thereby failed to prevent or minimize damage to the environment, he may lose part or the whole of his special compensation. The total special compensation is paid only if and to the extent that it is greater than any award recoverable under Article 13.⁴ Articles 13 and 14 are still applicable if the salvor's vessel and the salvaged vessel belong to the same owner.⁵

A relevant point is that, unlike other mandatory international instruments such as the Hague and Hague-Visby Rules⁶, the International Convention on Salvage allows the parties to contract out of its provisions either expressly or by implication.⁷ There are only two exceptions, in which case

² The “*safety net*” principle first appeared as a contractual provision in the Lloyd's Open Form (LOF) in the 1980 edition of the contract form, and was later codified in Article 14 of the International Convention on Salvage.

³ A tribunal may, exceptionally, increase the special compensation with up to 100% of the salvor's expenses.

⁴ For example, if the Article 13 award is \$600,000 and the Article 14 special compensation is \$720,000, then the \$600,000 will be paid by the shipowner and cargo interests *pro rata* to the salved value (covered by the property underwriters), while the balance of \$120,000 is payable by the shipowner alone (covered by his P&I insurer).

⁵ See: the International Convention on Salvage, Article 12(3).

⁶ See: the Hague/Hague-Visby Rules Article III rule 8.

⁷ See: the International Convention on Salvage, Article 6.

contracting out is not allowed: (1) when the salvage contract can be annulled or modified by the court under Article 7 if the contract has become inequitable or the payment thereunder has become excessively large or small, and (2) when the parties are under duties to minimize or prevent damage to the environment (Article 8).

3. The Lloyd's Open Form (LOF)

The Lloyd's Open Form (LOF) is the most widely used contract for salvage assistance to ships, and it proved to be very popular among professional salvors. This salvage agreement has served the shipping industry for more than 100 years, with the latest, eleventh, revision being LOF 2011. The LOF is under a constant review by the Lloyd's Salvage Group (LSG), which is the representative body established to carry out this task and which is consisted of representatives from Lloyds, the International Salvage Union (ISU), Property Underwriters, the International Group of P&I Clubs, International Chamber of Shipping, and others.⁸ The continuous amendment of LOF is carried out to guarantee that it will remain the most favoured salvage contract form by professional salvors and by the ISU.

There are indeed other standard forms of salvage contracts but none of them is an alternative to the LOF when it comes to flexibility and the possibility to incorporate the SCOPIC clause.⁹ The LOF is a *no cure-no pay* contract but, since the LOF 90 revision, it has adopted the principles of the International Convention on Salvage (1989). The LOF is a simple contract designed precisely for emergency situations, when time and immediate response are of essence. The contract can be agreed by the master on behalf of the shipowner without any pre-contractual negotiations between the parties regarding terms and conditions, which facilitates quick intervention. In other words, professional salvage assistance is guaranteed immediately and any commercial considerations, such as the salvor's reward, are left for after the salvage operations have been completed. Issues like financial aspects, law, jurisdiction, and obligations and liability of the parties are all found in the standard wording of the LOF as well as in the Lloyd's Standard Salvage and Arbitration Clauses (LSSA) and the Procedural Rules, the latter two being an integral part thereof.¹⁰

If necessary, an experienced arbitrator from the Lloyd's Salvage Arbitration Branch will assist the parties to a dispute. As of May 2005, a fixed cost arbitration procedure (FCAP) has been introduced which, in essence, allows for a documents-only arbitration process.

4. The SCOPIC clause

The SCOPIC clause was agreed in 1999 by several bodies as an alternative instrument to Article 14. The International Group of P&I Clubs, the International Salvage Union (ISU) and London property underwriters worked cooperatively to solve a number of problems in the application of Article 14, which had given rise to lengthy and costly arbitrations. Firstly, the difficulty to assess the amount of "*fair rate*" and to define "*threat to the environment*" caused uncertainties. Secondly, the geographical restriction of Article 14 precluded special compensation

⁸ Editorial: *Reform of LOF salvage arbitration*, (2011) 17 JIML, p. 167.

⁹ According to data from the International Salvage Union (ISU), for the period 1978-2005, there have been 2,701 salvage operations performed under a LOF contract out of 5,135 salvage operation in total.

¹⁰ The bundle of these three documents may be accessed at: <https://www.lloyds.com/the-market/tools-and-resources/lloyds-agency-department/salvage-arbitration-branch/lloyds-open-form-lof>.

to be awarded outside territorial and coastal waters. Thirdly, the House of Lords in *The Nagasaki Spirit*¹¹ ruled that the “fair rate” for the salvor’s equipment and personnel should not include any profit element, and thus the profit was limited only to the eventual uplift of the special compensation. Finally, there were also complaints by salvors about having problems with obtaining a satisfactory guarantee for their Article 14 special compensation, especially when the salvaged property had been lost.

All these problems were addressed by SCOPIC, which has been updated several times as the latest revision is SCOPIC 2014. It represents a long and detailed clause made up of 16 sub-clauses. The complete SCOPIC package contains the clause itself, three appendices, two codes of practice, and a salvage guarantee form.¹² The SCOPIC clause does not change Article 14 but instead it substitutes its methods of assessing the special compensation. SCOPIC is designed to be incorporated into an LOF contract, done simply by deleting the word ‘No’ in box 7 of the LOF. Thus, SCOPIC is not an automatically or mandatorily incorporated clause, and a standard LOF is not changed until the parties decide to use the clause and incorporate it accordingly.

If the clause is incorporated, the salvor cannot then claim any Article 14 award.¹³ Instead he can invoke SCOPIC whenever he chooses, through a written notice to the shipowners, even if there is no threat to the environment, and also without any geographical restriction.¹⁴ From the moment the clause is invoked, the assessment of the SCOPIC remuneration will commence, while all services performed prior to the invocation of the clause will be assessed under Article 13. Within two working days after the invocation, the shipowners shall provide US\$ 3 million, in the form of a bank guarantee or a P&I Club letter, as a security for the SCOPIC remuneration.¹⁵ If the shipowners fail to do so, the salvor is entitled to withdraw from SCOPIC and revert to Article 14 as if SCOPIC had not existed.¹⁶ P&I Clubs have agreed to provide security on behalf of an entered member for SCOPIC remuneration or for Article 14 Special Compensation, but it is not automatic. Clubs may refuse to give security in case of non-payment of calls, breach of warranty rules related to classification and flag state requirements, or other breach.¹⁷ However, it is agreed that the payment of any SCOPIC remuneration is a potential liability of the shipowner that is covered by his liability insurers (P&I Club) subject to the Club’s regulations and conditions of insurance.¹⁸

The SCOPIC remuneration is payable only by the shipowners and only to the extent that it exceeds a potential Article 13 award. It includes three components: (1) the agreed daily tariff rates (fixed in *Appendix A*) for the personnel, tugs, and portable salvage equipment, (2) the out-of-pocket expenses, and (3) a standard bonus equal to a 25% uplift. If SCOPIC is invoked but the Article 13 award appears to be greater than the SCOPIC remuneration, then not only no SCOPIC remuneration will be paid, but also the Article 13 award will be discounted by 25% of the difference between the

¹¹ *The Nagasaki Spirit* [1997] 1 Lloyd’s Reports 323.

¹² The bundle of these five documents (Appendix A, B, and C; the Code of Practice between International Salvage Union and International Group of P&I Clubs, the Code of Practice between International Group of P&I Clubs and London Property Underwriters, and the ISU5 Salvage Guarantee form) can be found at: <https://www.lloyds.com/the-market/tools-and-resources/lloyds-agency-department/salvage-arbitration-branch/scopic>.

¹³ See: SCOPIC, sub-clause 1.

¹⁴ See: SCOPIC, sub-clause 2.

¹⁵ See: SCOPIC, sub-clause 3(i).

¹⁶ See: SCOPIC, sub-clause 4.

¹⁷ See: *Code of practice between the International Salvage Union and the International Group of P&I Clubs*, para. 4.

¹⁸ See: *Code of practice between the International Salvage Union and the International Group of P&I Clubs*, para. 9.

award and the amount of the SCOPIC remuneration that would have been assessed had SCOPIC been invoked on the first day of the salvage services.¹⁹ Therefore, the bigger the difference between the Article 13 traditional award and the SCOPIC remuneration, namely the bigger the overuse or abuse of the clause, the more the Article 13 award will be diminished.

Once SCOPIC has been invoked, the shipowners may appoint a Special Casualty Representative (SCR), who monitors the salvage operations and reports to the P&I Club (*Appendix B*). Similarly, the H&M underwriter and the cargo underwriter may each appoint a Special Representative (*Appendix C*).

The salvor may terminate both SCOPIC and the LOF if the total cost of past and future services is anticipated to exceed the sum of the salvaged value plus any SCOPIC remuneration. On the other hand, the shipowners may not escape from the LOF but they may terminate SCOPIC at any time by giving a five-day notice.²⁰ Nevertheless, no termination will take place if the shore authorities do not permit it.

5. Conclusion

The SCOPIC clause is not perfect but the 1999-2010 figures show that it is working well: out of 1008 LOF cases, SCOPIC was incorporated in 327 cases (32% of the cases) and it was invoked in 240 cases (24% of the cases), while there were only seven SCOPIC arbitrations.²¹ The major advantage and novelty of the SCOPIC clause under an LOF salvage contract is that when professional salvors are uncertain about the outcome of the operation, they have available at all time the option to resort to the alternative remuneration provided by SCOPIC, and in this way at least to recover their costs invested in the salvage operation.

The following table summarizes the various salvage awards available. Note that it is not intended to provide a comprehensive statement of the law. The table rather represents a recapitulation of the salvage awards discussed in the article as well as a tool which allows the reader to easily compare the awards and to understand the differences between them.

Award	Right to an award	Amount	Payable by	Insured by
<u>Article 13 award</u> (traditional award) <i>No cure-no pay</i>	When salvage operations have had a useful result.	Assessed, taking into account ten criteria (<i>e.g.</i> the salvaged value of ship and cargo, measure of success). Cannot exceed the salvaged value of the vessel and other property.	Shipowners and cargo interests <i>pro rata</i> to value	Property underwriters (H&M and cargo underwriters)
<u>Article 14 award</u> (special compensation) <i>Safety net</i>	When there is a “ <i>threat to the environment</i> ”, and Art 13 award too little or none.	Equal to: - the salvor’s expenses (out-of-pocket expenses plus a “fair rate”); - a possible increase of up to 30% (exceptionally, up to 100%).	Shipowners	Liability insurers (P&I Clubs)
<u>SCOPIC remuneration</u> <i>Safety net</i>	When SCOPIC is invoked by the salvor.	Equal to: - the agreed tariff rates of personnel, tugs, and portable salvage equipment; - the out-of-pocket expenses; - a bonus of 25%.	Shipowners	Liability insurers (P&I Clubs)

¹⁹ This discount mechanism (*sub-clause 7*) is intended to prevent salvors from invoking the SCOPIC clause too often and too readily. Thus, if the Art 13 award is for \$2,800,000, and the SCOPIC remuneration is for \$2,000,000, then the Art 13 award will be deducted with \$200,000 (25% of the \$800,000 difference between the two sums), resulting in a net Art 13 award of \$2,600,000.

²⁰ See: SCOPIC, *sub-clause 9(ii)*.

²¹ Archie Bishop – ‘*The mystery of SCOPIC unravelled*’, available at <http://www.marine-salvage.com/>.

From the perspective of the insurers, the amount of the salved value, which has a bearing on the Article 13 award, may create a tension between the various insurers.²² Thus, when the salved value is low, meaning that the Article 13 award is low, too, then the H&M underwriters are favoured because the traditional award under Article 13, payable by them, cannot exceed the salved value of the vessel and other property. Conversely, if the salved value is high, then the SCOPIC remuneration will be correspondingly low or none because it is paid up to the extent of the Article 13 award (which, presumably, will be higher than the SCOPIC remuneration) and this favours the liability insurers – the P&I club in which the vessel has been entered.

²² Steven J. Hazelwood, David Semark – *'P&I Clubs Law and Practice'* (4th ed.), London 2010, p. 186, para 10.255.